Supreme Court, U.S.
FILED
05-126 JUL 20 2005
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

MIN YOON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

NORMAN J. SILVERMAN
Counsel of Record
801 Congress, Suite 200
Houston, Texas 77002
(713) 526-1515

ABIGAIL L. KEENAN
801 Congress, Suite 200
Houston, Texas 77002
(713) 526-1515

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The doctrine of "consent once removed" permits a warrantless entry into a residence by officers where an undercover agent or government informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers. Does this doctrine violate the Fourth Amendment where the initial consensual entry is by a civilian informant rather than an undercover police officer?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

The Sixth Circuit Court of Appeals has decided an important question of federal law in conflict with the relevant decisions of this Court. This question has not been, but should be, settled by the Supreme Court: whether the doctrine of "consent once removed" violates the Fourth Amendment as applied to a civilian informant 3

CONCLUSION 16

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Camara v. Municipal Court of San Francisco, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) 14

Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) 14

Flippo v. West Virginia, 528 U.S. 11, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999) 14

Florida v. Jimeno, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991) 5

Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990) 5, 8

Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) 11, 12

Illinois v. Rodriguez, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) 13

Johnson v. United States, 333 U.S. 10, 69 S. Ct. 367, 92 L. Ed. 436 (1948) 15

Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) 13

Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) 13

Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) 8

United States v. Akinsanya, 53 F.3d 852 (7th Cir. 1995) 3, 7

TABLE OF AUTHORITIES – Continued

Page

United States v. Bramble, 103 F.3d 1475 (9th Cir. 1997) 7

United States. v. Buchanan, 904 F.2d 349 (6th Cir. 1990) 15

United States v. Butler, 74 F.3d 916 (9th Cir. 1996) 6, 9

United States v. Calandrella, 605 F.2d 236 (6th Cir. 1979) 6, 9

United States v. Chhunn, 11 F.3d 107 (8th Cir. 1993) 6, 9

United States v. Diaz, 814 F.2d 454 (7th Cir. 1987), *cert. denied, Diaz v. U.S.*, 484 U.S. 857, 108 S. Ct. 166, 98 L. Ed. 2d 120 (1987) 6

United States v. Gonzales, 220 F.3d 922 (8th Cir. 2000) 9

United States v. Hare, 589 F.2d 1291 (6th Cir. 1979) 15

United States v. Hensley, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985) 6, 9

United States v. Jachimko, 19 F.3d 296 (7th Cir. 1994) 7, 11

United States v. Janik, 723 F.2d 537 (7th Cir. 1983) 4

United States v. Martinez-Fuerte, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976) 14

United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974) 5

United States v. Paradis, 802 F.2d 553 (1st Cir. 1986) 6, 9

United States v. Paul, 808 F.2d 645 (7th Cir. 1986) ... 4, 6, 11

TABLE OF AUTHORITIES – Continued

Page

United States v. Pollard, 215 F.3d 643 (6th Cir. 2000), *cert. denied*, *Pollard v. U.S.*, 531 U.S. 999, 121 S. Ct. 498, 148 L. Ed. 2d 469 (2000) 7

United States v. Williams, 54 F.3d 497 (6th Cir. 2003) 15

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

From the United States Constitution:

U.S. CONST., amend. IV ..... *passim*

From the United States Code:

18 U.S.C. § 2 3

21 U.S.C. § 841(a)(1) 3

21 U.S.C. § 846 3

28 U.S.C. § 1254(1) 1

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reported at 398 F.3d 802 (6th Cir. 2005). It is reprinted in Appendix A hereto.

STATEMENT OF JURISDICTION

On February 24, 2005, the United States Court of Appeals for the Sixth Circuit entered its opinion affirming the conviction in this case. On May 12, 2005, the Court of Appeals issued an order denying Petitioner's timely motion for rehearing. In accordance with Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the entry of the order denying the motion for rehearing.

Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution states in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

U.S. CONST., amend. IV.

STATEMENT OF THE CASE

Following his arrest on June 8, 2002, for a drug deal, co-defendant Meen W. Kim agreed to act as an informant for the Tennessee Bureau of Investigation (TBI). Later that day, Kim set up a marijuana transaction with Min Yoon (Petitioner) to take place at an apartment at 2010 Brentridge Circle. The police provided Kim with an audio transmitter and instructed him to subtly indicate when he saw the marijuana, at which point the officers would make entry. Although the police provided Kim with a bundle of cash, it was significantly less than the amount that would have been required to complete the transaction.[1] This caused one of the TBI officers conducting the raid to be concerned for Kim's safety.

Once Yoon admitted Kim into the apartment, the officers monitoring the audio transmission heard Kim ask "[h]ey, are you having to break it down?" Yoon provided an affirmative response. Kim then asked, "[w]ell, is that all there is?" to which Yoon replied "[n]o, no, there's more." The police then forcibly entered the apartment. The eighty pounds of marijuana seized in the apartment were observed in plain view as the officers conducted a protected sweep. Yoon was arrested as he tried to flee by climbing out a window. When asked for consent to search the apartment, Appellant answered, "Go ahead, you're already here."

Yoon moved to suppress the evidence obtained from the apartment on the grounds that the entry violated the

---

[1] A TBI officer testified at the hearing that the full amount of cash could not be obtained during the weekend. (Transcript of Motion to Suppress Hearing at 20-22).

Fourth Amendment. The government asserted the warrant exception of "consent once removed," and the district court denied the motion. Yoon pled guilty to charges of conspiracy and possession with intent to distribute marijuana (21 U.S.C. §§ 841(a)(1) and 846; 18 U.S.C. § 2), reserving in a plea agreement the right to appeal the legality of the entry and search of the apartment.

The Court of Appeals for the Sixth Circuit affirmed the conviction, holding for the first time that the doctrine of "consent once removed" extends to cases in which the initial consensual entry is by a confidential informant.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals has decided an important question of federal law in conflict with the relevant decisions of this Court. This question has not been, but should be, settled by the Supreme Court: whether the doctrine of "consent once removed" violates the Fourth Amendment as applied to a civilian informant.

The doctrine of "consent once removed," created by the Seventh Circuit and adopted by the Sixth Circuit, permits a warrantless entry into a residence by officers where an undercover agent or government informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers.[2]

[2] *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995) (holding that police could lawfully enter apartment to make a

(Continued on following page)

Yoon asserts that this rule carves out a significant exception to the warrant requirement and thus drastically departs from this Court's Fourth Amendment jurisprudence, particularly when applied to cases where the invitee is merely a civilian informant.

A. The Origin of the Doctrine.

The Seventh Circuit held in *United States v. Janik*[3] that when one invites an undercover agent into his house, the agent can summon other agents to assist in the arrest without requiring a warrant. Subsequently, in *United States v. Paul*,[4] the court of appeals further developed the conceptual basis for the doctrine by noting that an undercover law enforcement agent who is admitted into a suspect's home by consent does not need a warrant; he or she may seize drugs that are found in plain view therein; and he or she may, upon a finding of probable cause, summon other officers to assist in a warrantless in-home arrest.[5]

---

warrantless arrest after informant had entered apartment with consent, viewed contraband, and alerted the arrest team).

[3] 723 F.2d 537, 548 (7th Cir. 1983) (holding that where defendant consented to the entry of a friend who was a law enforcement officer into his apartment and showed him illegal weapons, friend could lawfully summon ATF agents into apartment without requiring a warrant).

[4] 808 F.2d 645 (7th Cir. 1986) (holding that after informant, equipped with electronic transmitting device, was admitted into defendant's house with consent, saw contraband, and triggered the device, federal agents could forcibly enter to arrest and search without a warrant).

[5] *Id.* at 648.

Thus, the doctrine is not based upon the traditional consent exception to the warrant requirement. It is axiomatic that citizen has a right to selectively give consent, and a party's granting of consent to one individual to enter a dwelling does not necessarily give *that* individual the authority to extend consent to others. The scope of a suspect's consent under the Fourth Amendment is determined by ascertaining what the typical reasonable person would have understood by the exchange between the officer and the suspect.[6] Under this analysis, consent given to a guest who happens to be an informant cannot be said to reasonably encompass consent to a subsequent police raid. Moreover, a guest's authority to give consent is determined by whether the guest has common authority over the premises; a casual guest in a home has no common authority over the premises and cannot give general consent to enter and search the premises.[7]

While the doctrine cannot be said to be derived from traditional consent, it was arguably conceived from two well established rules that pertain to law enforcement officers: (1) plain-view doctrine, which permits officers to lawfully seize incriminating evidence in plain view;[8] and (2) the doctrine of "collective knowledge," which permits courts to impute the knowledge of one officer to other

---

[6] *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991).

[7] *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974).

[8] *See Horton v. California*, 496 U.S. 128, 136-137, 110 S. Ct. 2301, 2307-2308, 110 L. Ed. 2d 112 (1990).

officers involved in an investigation in order to uphold an otherwise invalid search or seizure.[9]

The *Paul* Court, however, was presented with a factual scenario in which the invitee was merely a civilian informant rather than a law enforcement officer. The court dismissed the distinction and extended the rule to include cases in which the invitee was a civilian informant.[10] The court offered several justifications for the extension of the rule: (1) that because under state law the informant invitee could have made a citizen's arrest upon seeing contraband, he could summon officers to assist in the arrest without implicating the Fourth Amendment; (2) that the defendant had "fatally compromised" his privacy interests by displaying contraband to the informant so as to waive any rights under the Fourth Amendment; and (3) that the "incremental" difference between a civilian informant and a police officer was "too slight to bring the requirement of a warrant into play."[11]

The Seventh Circuit has since used the doctrine to validate warrantless entries into residences several times, once involving a police officer invitee,[12] and twice involving

---

[9] *See, e.g., United States v. Hensley*, 469 U.S. 221, 232, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985); *United States v. Chhun*, 11 F.3d 107, 110 (8th Cir. 1993); *United States v. Calandrella*, 605 F.2d 236, 246 (6th Cir. 1979); *United States v. Butler*, 74 F.3d 916, 921 (9th Cir. 1996); *United States v. Paradis*, 802 F.2d 553, 557 (1st Cir. 1986).

[10] *Paul*, 808 F.2d 645 at 647-648.

[11] *Id.* at 648.

[12] *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987) (holding that drug enforcement agents could forcibly enter hotel room without a warrant after receiving signal from fellow agent who, acting undercover, had entered room with defendant's consent and viewed cocaine),

(Continued on following page)